STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 233455 Washtenaw Circuit Court
HAROLD MORRISON, Defendant-Appellant.	LC No. 99-013219-FH

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

The jury convicted defendant of three counts of extortion, MCL 750.213, and the court sentenced defendant to 160 months to 20 years' imprisonment for each of the convictions. He appeals as of right, and we affirm.

I.

Facts

Defendant is a prison inmate housed at the Huron Valley Men's Facility. On December 29, 1998, Jackson County's elected prosecutor received a letter, and the return address suggests that defendant sent the letter. Also, the letter contained defendant's signature and also contained the name of a fellow inmate, Jack McDonnell. The letter demanded $100,000, and threatened violent consequences for the prosecutor and his family if the money was not paid, and the prosecutor testified that he took the threats very seriously.

On December 30, 1998, defendant sent two additional letters from the Huron Valley Men's Facility, one to a circuit court judge from Van Buren County and the other to a prosecutor from Ingham County. These letters were received on January 5, 1999, and contained the printed name of Jack McDonnell and his inmate number. They also contained defendant's signature and inmate number. The circuit court judge who received the letter also assumed defendant was the author because the judge had sentenced defendant on his felony conviction. The Ingham County prosecutor, who had no previous contacts with defendant, also assumed that defendant wrote the letter. Both letters demanded money and contained explicit threats of violence to the recipients and their families if the monetary demand was not met, and the recipients testified that they took the threats seriously.

A Michigan State Police detective questioned defendant about the letters and the detective testified that, during the questioning, defendant admitted that he read, signed and mailed the letters. Further, while his fellow inmate McDonnell wrote the body of the letters, defendant admitted that the letters contained some of his ideas and that he wrote the postscript found at the bottom of the letter to the Ingham County prosecutor. Defendant also admitted that he meant what was written in the letters and that he had the capability of having the threats carried out on the outside of prison. Defendant also said that he had successfully extorted money on previous occasions.

At trial, defendant testified that he does not read "good" and only had a sixth grade, special education. He claimed to be learning disabled, said that McDonnell wrote the letters, and though he signed and mailed the letters, he testified that he never read them. Defendant also testified that he did not write anything other than his name and inmate number on the letters. Defendant said that he elicited McDonnell's help to write to the circuit court judge who sentenced him and to other people in power who might help his case. However, defendant maintained that he did not know the letters were threatening letters. At trial, defendant admitted to making many of the incriminatory statements that were attributed to him by the Michigan State Police detective. However, defendant testified that most of the statements made to the detective were lies. In essence, defendant said that he told the detective what the detective wanted to hear so the interview would end faster, and that he never anticipated that he would be prosecuted.

II.

Sufficiency of the Evidence

Defendant argues that there is insufficient evidence to support his three convictions for extortion. When reviewing the sufficiency of the evidence, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citation omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the weight to be given to the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The crime of extortion is defined by MCL 750.213:

> Any person who shall . . . orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony. . .

According to our case law, statutory extortion requires proof of a communication which threatens injury to the person or the person's family with intent to extort money. *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985); *People v Krist*, 97 Mich App 669, 675; 296

NW2d 139 (1980). Our Legislature did not intend to punish every minor threat, *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996), but did intend to punish serious threats for monetary gain. *Id*. at 485-486.[1]

Here, viewing the evidence in a light most favorable to the prosecution, a rational jury could find that the essential elements of the crime of extortion were proved beyond a reasonable doubt. Defendant admitted that he read, signed, and sent three very threatening letters. He also assisted in drafting each of them. The letters specifically contained threats of serious bodily injury to the recipients, their wives, and their children. Defendant's intent to extort money is self evident from the text of the letters, wherein he demands $100,000 from each victim. Further, defendant admitted that he had the means to carry out his threats and that he meant what he wrote in the letters. He also admitted that he had successfully extorted money from others on previous occasions. This evidence supports a finding that defendant committed the act of sending the letters with the illegal intent to extort money.

III

Prosecutorial Misconduct

Defendant also contends that the prosecutor committed misconduct during his direct examination of the police detective who interviewed defendant. Defendant did not preserve this issue by objecting to the prosecutor's conduct at trial. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

After the extortion letters were admitted into evidence, the prosecutor asked the detective to read them into the record and point out the portions of each letter that defendant admitted to drafting. Defendant argues that this procedure was improper because it permitted the detective "to editorialize, paraphrase and be selective" in recounting defendant's statements from the police interview. This argument is not supported by citation to authority. During the lengthy interview, defendant made several admissions. Of course, admissions against interest, which are made by a party-opponent, are not hearsay and are therefore admissible. MRE 801(2). Accordingly, the prosecutor's questions, which properly elicited defendant's admissions against interest, do not constitute prosecutorial misconduct. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Also, contrary to defendant's assertion, there is no requirement that a police interview be recorded and comprehensively presented to the jury. Indeed, we have rejected the proposition that police interviews must be recorded. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998).

IV

[1] This case does not involve extortion arising out of a compelled act or omission. Thus, contrary to defendant's argument, proof that the victim undertook an action of serious consequence is not necessary. See *Hubbard, supra* at 485-486.

Improper Closing Argument

Additionally, defendant says that the prosecutor's closing argument contained several improprieties.

Defendant claims that the prosecutor denigrated the defense and expressed a personal belief that defendant was guilty of the charged crimes. Because defendant did not object to any of the challenged comments, the issues are unpreserved and we review only for plain error. *Watson, supra.* Though a prosecutor may not vouch for a defendant's guilt, *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988), a prosecutor may argue from the facts that the defendant is not worthy of belief. *Id.*; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor is also permitted to characterize a defendant as a "liar" if the comment is based on the evidence produced at trial. *Id.* Also, the prosecutor's use of the phrase "I believe," does not automatically constitute improper vouching. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995) (Boyle, J., joined by Brickley, C.J. and Riley, J., with Cavanagh, J. and Mallet, J., concurring). The challenged comments must be evaluated in light of the evidence, and the crucial inquiry is whether the prosecutor was trying to vouch for the defendant's guilt. *Id.*

Here, a review of the challenged comments reveals that the prosecutor's arguments were within the bounds of propriety. The prosecutor never argued a personal belief that defendant was guilty. Rather, he argued that he believed the prosecution had proved its case beyond a reasonable doubt based on the evidence and inferences. This was proper argument. Further, we disagree with defendant's contention that the prosecutor denigrated defendant or his defense. Defendant made numerous admissions of guilt to the Michigan State Police detective who conducted his interview. At trial, however, defendant claimed that he lied to the detective. The prosecutor's argument that defendant was really lying to the jury and not to the detective was based on the evidence presented at trial and inferences drawn from that evidence. Further, we find no impropriety in the prosecutor's argument that, under the circumstances, it was easy for defendant to blame his co-inmate, McDonnell, for the crime. The evidence shows that McDonnell died before trial and could not testify about defendant's role in drafting and sending the letters.

Defendant also argues that the prosecutor mischaracterized the testimony of the detective and vouched for the credibility of the detective on several occasions. Defendant challenged only one comment at trial. We review the preserved claim of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). The unpreserved claims are reviewed for plain error. *Id.* "A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *People v Rodriquez*, 251 Mich App 10, 31; 650 NW2d 96 (2002) (citation omitted). Further, a prosecutor may not mischaracterize the evidence. *Watson, supra* at 588. We have reviewed the challenged comments and find that the prosecutor neither mischaracterized the detective's testimony, nor improperly vouched for the detective's credibility. The prosecutor argued that the detective was worthy of belief based on the evidence and reasonable inferences drawn therefrom. Under the circumstances, we find no reversible misconduct.

V

Jury Instructions

Defendant avers that the trial court erred in failing to give several jury instructions. Defendant failed to preserve these issues for appeal because defendant neither requested the instructions nor objected to their absence. *People v Sabin (On Second Remand),* 242 Mich App 656, 657; 620 NW2d 19 (2000). Accordingly, we review this issue for plain error. *Aldrich, supra* at 125.

First, defendant argues that the trial court should have instructed the jury using CJI2d 4.11, which cautions the jury about the manner in which it may consider other bad-acts evidence introduced throughout the trial. Defendant argues that because evidence of his prior conviction and incarceration was presented to the jury at trial, the trial judge should have sua sponte given the cautionary instruction. We disagree. A trial court has no duty to sua sponte instruct using CJI2d 4.11, even if the instruction was warranted. *People v Rice (On Remand),* 235 Mich App 429, 443-444; 597 NW2d 843 (1999).

Second, defendant argues that the trial court should have sua sponte instructed the jury using CJI2d 8.5, which provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

The plain language of the instruction relates to the proof necessary to hold a defendant responsible for assisting in a crime. CJI2d 8.5 is found in the section of the standard criminal instructions that addresses aiding and abetting. Defendant in this case was charged as a principal, not an aider and abettor, and therefore, this jury instruction is simply inapplicable.

Finally, defendant argues that the trial court erred in failing to instruct the jury about his theory of the case. We disagree. An instruction on a defendant's theory of the case is not mandatory and is required only if requested. *People v Mills,* 450 Mich 61, 81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995), citing *People v Wilson,* 122 Mich App 1, 3; 329 NW2d 513 (1982). Defendant made no request for this instruction. More importantly, defense counsel presented defendant's theory to the jury during his closing argument, and therefore, defendant was not prejudiced by the lack of this instruction.

VI

Because defendant's arguments regarding jury instructions lack merit so does his argument that he was denied effective assistance of counsel due to counsel's failure to request these instructions.

VII

Sentencing

Defendant maintains that the trial court improperly scored offense variable (OV) 9 at twenty-five points, OV 13 at twenty-five points, and OV 19 at fifteen points. He erroneously

argues that he is entitled to resentencing because of the scoring errors. We must affirm sentences that fall within the sentencing guidelines' recommended range unless there is an error in the scoring of the guidelines or inaccurate information is relied on in determining the defendant's sentence. *People v Libbett*, 251 Mich App 353, 363-364; 650 NW2d 407 (2002). We will uphold a scoring decision if it is supported by the evidence. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

Defendant preserved his challenge to the scoring of OV 9. MCL 777.39 provides that twenty-five points may be scored for OV 9 if there were ten or more victims. Each person who was placed in danger of injury or loss of life as a victim must be counted when scoring this offense variable. MCL 777.39(2). Because defendant threatened each of the three men who received the letters, as well as their wives and children, who numbered well in excess of ten people, the trial court properly scored the variable at twenty-five points. On appeal, defendant argues, unpersuasively, that the family members were never placed in danger of injury or loss of life and therefore, they should not have been counted as victims.

Because the issue of whether family members should have been counted for purposes of OV 9 involves statutory interpretation, we review this issue de novo. *Libbett, supra* at 365-366. We presume that the Legislature intended the plain meaning of the statute, and only if the language is ambiguous, will we engage in judicial construction. *Id.* We find that the language of MCL 777.39 is unambiguous, and we apply it as written. Here, there are more than ten victims that were placed in danger of injury or loss of life. Defendant assisted in drafting the letters, which directly threatened the recipients, their children and their wives. Defendant confessed that he mailed the letters, meant what was written in them, and had the capability of having the heinous acts carried out. In the Presentence Investigation Report, defendant's description of the offense affirmed his previous admissions that many of the ideas of punishment and torture were his and that he informed the police that he could have the "stuff" done. Further, defendant admitted stating that "the guy I know might still do those things even though he is supposed to wait for further instructions." (PSIR, pp 4-5.) Defendant's admissions support the trial court's determination that defendant placed more than ten victims in danger. Because the scoring decision is supported by evidence, we affirm. *Leversee, supra.*

Defendant also argues that OV 19 was improperly scored at fifteen points. At sentencing, the prosecutor argued that OV 19 was improperly scored at zero points. He requested that the score be changed to twenty-five points. Defendant neither objected to the prosecutor's request nor to the trial court's ultimate decision to raise the score from zero to fifteen points. (S Tr, pp 13-16). Therefore, defendant's appellate challenge to the scoring of OV 19 is not properly preserved. MCL 769.34(10). Furthermore, we note that the scoring of OV 19 at fifteen points instead of zero points does not change the sentencing guidelines range. Because the alleged scoring error does not change the recommended sentence range and because the court sentenced defendant within the appropriate guidelines range, any alleged error is harmless. MCL 769.34(10).[2]

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[2] Finally, defendant's challenge to the scoring of OV 13 is abandoned. He provides no argument to support his claim that the offense variable was improperly scored at twenty-five points. A defendant may not merely announce his position and leave it to this Court to discover and

(continued…)

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens

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rationalize the basis of his claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).